89-431

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

COLLEEN DONNELLY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether federal courts have exclusive jurisdiction over claims arising under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

Whether a victim of employment discrimination is obligated to seek comparable employment, when such employment is available in the area, to be eligible for an award of back pay under § 706(g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(g).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Yellow Freight System, Inc. ("Yellow Freight") petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit dated April 28, 1989 (A-1 to A-19)[1]

1. References in the form (A-1 to A-.....) refer to pages of the Appendix. References in the form (T-.....) refer to pages of the Transcript of Proceedings before the Magistrate on November 3, 1987.

is reported as 874 F.2d 402. In an unpublished order dated July 17, 1989, the United States Court of Appeals for the Seventh Circuit denied Yellow Freight's Petition for Rehearing with Suggestion for Rehearing En Banc (A-20). The opinion of the United States District Court for the Northern District of Illinois entered March 17, 1988 on the issue of mitigation of damages is reported at 682 F. Supp. 374. The Report and Recommendation of the United States Magistrate (A-26 to A-34), entered December 10, 1987, is not reported. The opinion of the District Court entered November 22, 1985 on the issue of jurisdiction in Title VII actions (A-35 to A-39) is not reported. The order of the Circuit Court of Cook County, Illinois, dismissing plaintiff's complaint with prejudice and continuing her contested motion for leave to file an amended complaint, entered August 9, 1985 (A-40), is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 28, 1989 (A-1) and the Petition for Rehearing was denied on July 17, 1989 (A-20). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e-5(f) provides as follows:

> Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate, temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judges to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.
>
> (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the

Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its dis-

cretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate, temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be

brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action may have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

2. Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), provides as follows:

Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an

unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

3. Section 706(j) of Title VII, 42 U.S.C. § 2000e-(5)(j) provides as follows:

Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

STATEMENT OF THE CASE

This case was initially instituted in the Circuit Court of Cook County, Illinois on May 22, 1985. Asserting that Yellow Freight had wrongly refused to hire her for a job as a dock worker, plaintiff brought a two-count complaint alleging sex discrimination in violation only of the Illinois Human Rights Act (Ill. Rev. Stat., Chapter 68, ¶ 1-101 et seq. (1983)). Because plaintiff had not attempted to exhaust her administrative remedies, Yellow Freight filed a motion to dismiss the Complaint for lack of jurisdiction. Plaintiff then sought leave to file an amended Complaint.

On August 9, 1985, the Circuit Court entered an agreed order dismissing the Complaint with prejudice and continuing plaintiff's contested motion for leave to file an amended Complaint (A-40). On August 14, 1985, Yellow Freight removed the case to the United States District Court pursuant to 28 U.S.C. § 1441(b) and (c). On September 13, 1985, the District Court granted plaintiff leave to file an amended Complaint, and on September 20, 1985, plaintiff, for the first time, filed a Complaint alleging violations of Title VII. Yellow Freight's motion to dismiss the amended Complaint for lack of jurisdiction was denied by the District Court. The District Court held that State Courts have concurrent jurisdiction over Title VII claims (A-35 to A-39).

Plaintiff first applied to Yellow Freight on October 26, 1982, at a time when the company was not hiring dock workers. The terminal manager informed plaintiff that the company was not hiring but that she would be the first person hired when the situation changed. Yellow Freight did not begin hiring dock workers until

February 8, 1983. The company admitted liability to plaintiff between February 8, 1983 and June 26, 1984, the date she was actually hired.

Yellow Freight's backpay liability was tried before a magistrate. The magistrate found that plaintiff did not seek a job with any other trucking company although several trucking companies besides Yellow Freight had facilities in the general area in which plaintiff was interested in working. Each of these companies hired dock workers during the relevant time period (A-28). One of those companies, which hired several women as dock workers, regularly advertised for dock workers in the Sunday Chicago Sun-Times. Plaintiff claimed that she read the want-ads in the Sun-Times, but did not apply for any job she saw advertised (A-27).

Plaintiff obtained a part-time job as an inventory checker in December, 1982 (A-27), before the first date of Yellow Freight's potential backpay liability. She worked at this job less than 750 hours over the next 18 months. Plaintiff asked friends and neighbors about other jobs, but she did not register with the state job service. Plaintiff applied for a job with the Jewel food store where she shopped but did not apply for a job at the Dominicks food store in her neighborhood. During this period plaintiff called Yellow Freight only to be told that the company was not hiring at all, but was laying off employees. Plaintiff knew this was false as of March, 1983, but still took no action to look for a comparable position (T-33). Her only explanation was that she "was determined to get on at Yellow Freight." (T-27).

The magistrate concluded that "The amount of diligence shown by [plaintiff] in seeking work was not great."

(A-29). Stating that "the issue is close" (A-30), the magistrate relied upon the Seventh Circuit rule that working part-time satisfies the mitigation requirement. The magistrate concluded that Yellow Freight failed to carry its burden of proof that plaintiff failed to exercise reasonable diligence in securing "other employment" during the period in question (A-30).

Agreeing that the facts present a close case (A-23), the District Court adopted the magistrate's report. It rejected Yellow Freight's argument that plaintiff has an obligation to seek substantially equivalent employment. Instead, the Court held that "[t]he real question is whether a plaintiff has demonstrated a continuing commitment to be a member of the labor force." (A-24).

On appeal, the Seventh Circuit affirmed the award of backpay. Overruling its recent decision in *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932 (7th Cir. 1988), the Court of Appeals held that State courts have concurrent jurisdiction over Title VII claims. In a footnote, the Court acknowledged that its decision created a conflict with *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984).

On the issue of mitigation, the Seventh Circuit held that Yellow Freight must prove that plaintiff was not reasonably diligent "in seeking other employment." (A-17). The Court held that when a plaintiff is denied initial employment, he or she can satisfy the mitigation requirement by "demonstrating a continuing commitment to be a member of the work force." (A-18). The Court then applied its own rule that "part-time work in another employment field satisfies the mitigation requirement." (A-18) (citations omitted). The Seventh Circuit did not address Yellow Freight's contention that plaintiff was required at least initially to seek employment substantially equivalent to the job she was denied.

REASONS FOR GRANTING THE PETITION

A. There Is A Split Among The Circuits On An Issue Of Widespread Importance As To Whether Federal Courts Have Exclusive Jurisdiction Over Title VII Claims.

Before this case, every other Court of Appeals to consider the question held that jurisdiction over Title VII claims is lodged exclusively in the federal courts. *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3d Cir. 1986); *Dyer v. Greif Bros., Inc.*, 755 F.2d 1391, 1393 (9th Cir. 1985); *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984); *Jones v. Intermountain Power Project*, 794 F.2d 546, 553 (10th Cir. 1986); *Long v. State of Florida*, 805 F.2d 1542, 1546 (11th Cir. 1986), *cert. denied*, ... U.S. ....., 108 S.Ct. 78, 98 L.Ed.2d 41 (1988). The Seventh Circuit is alone among the Courts of Appeals in its view that State courts share concurrent jurisdiction over Title VII claims.

This issue has extraordinary importance for the administration of the Civil Rights Act. Until the conflict among the circuits is resolved, there will be substantial confusion regarding the forum in which discrimination claims can be brought.[2]

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2. According to the Administrative Office of the United States Courts, excluding prisoner petitions, there were 68,015 private civil suits asserting federal question jurisdiction filed in the federal district courts for the 12 months ending June 30, 1988. Of these, 7,169, or 10.5 percent, were civil rights employment cases. Annual Report of the Director of the Administrative Office of the United States Courts 1988, Table C 2. While some of these cases may have been filed under other civil rights statutes than Title VII, the statistics suggest that a significant portion of the workload of the federal district courts is made up of Title VII actions.

There will also be widespread and unnecessary litigation over application of claim preclusion principles to Title VII actions. In most jurisdictions, preclusion depends upon whether the "court rendering the prior judgment . . . had jurisdiction to decide the subsequent claim." *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96 (3d Cir. 1988), *quoting Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1437 (9th Cir. 1985) (Kennedy, J. concurring). Until this court resolves whether state courts have jurisdiction over Title VII claims, the lower courts will not have the guidance they need in order to apply claim preclusion principles properly.

Unless the Seventh Circuit's decision is reversed, it will disrupt the delicately balanced remedial scheme of Title VII as envisioned by Congress and interpreted by the Equal Employment Opportunity Commission.[3] When Congress considered Title VII, both the supporters and opponents understood that enforcement was to be in the federal district courts. As Senator Humphrey explained in presenting the Dirksen substitute which eventually became § 706 of the Act:

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3. Section 706(f)(4), 42 U.S.C. § 2000e-5(f)(4), requires the chief judge of the district or the circuit "immediately to designate a judge in such district to hear and determine the case." The designated judge is required by § 706(f)(5), 42 U.S.C. § 2000e-5(f)(5), "to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." If the case is not scheduled for trial within 120 days after issue has been joined, the judge may appoint a master "pursuant to Rule 53 of the Federal Rules of Civil Procedure." *Id.* Under § 706(f)(2), 42 U.S.C. § 2000e-5(f)(2), injunctive relief must be issued in accordance with Rule 65. Section 706(j), 42 U.S.C. § 2000e-5(j), requires that appeals be brought as provided by 28 U.S.C. §§ 1291 and 1292. If the States have concurrent jurisdiction over Title VII actions, one must either ignore these provisions or assume that Congress intended to regulate the procedures and priorities of the state courts and administrative agencies.

> [I]f the Commission has not been able to secure voluntary compliance within 30 days . . . the Commission must so notify the person aggrieved, who may within 30 days bring his own suit in federal court for enforcement of his rights.

110 Cong. Rec. 12722 (1964). Other passages of the congressional debate, all of which were ignored by the Seventh Circuit, make it clear that Congress "preferred that the ultimate determination of discrimination rest with the Federal judiciary." H.R. Rep. 914, 88th Cong., 1st Sess. at 29 (1963) (separate views of Rep. McCulloch).

The Equal Employment Opportunity Commission is also of the view that federal courts have exclusive jurisdiction over Title VII suits. *See* amicus briefs filed by the EEOC in *McNasby v. Crown Cork & Seal Co.*, app. pending, 3d Cir. No. 88-1893, and *Pirella v. Village of North Aurora*, app. pending, 7th Cir. No. 89-1231.

By thrusting state courts into the business of adjudicating Title VII claims, the Seventh Circuit has not only violated the Congressional intent, but it has sown the seeds for years of unnecessary procedural litigation. Because of the importance of the issue to the administration of a vital federal statute, this Court should grant a writ of certiorari to resolve the conflict among the circuits as to whether federal courts have exclusive jurisdiction over Title VII claims.

B. The Decision In This Case Has Created A Split Among The Circuits Over Whether A Victim Of Employment Discrimination Must At Least Initially Seek Comparable Employment, When It Is Available, To Be Eligible For An Award Of Back Pay.

A Title VII claimant "is subject to the statutory duty to minimize damages set out in § 706(g). This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982) (footnotes omitted). Five Courts of Appeals have held that "A Title VII plaintiff is required to mitigate damages by being reasonably diligent in seeking employment substantially equivalent to the position he or she lost." *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1470 (11th Cir. 1985).[4] This line of cases is consistent with this Court's teaching that claimants are not required to take other "lesser or dissimilar work" while their claims are pending. *Ford Motor Co.*, 458 U.S. at 231 n. 14.

The Seventh Circuit, however, has created a different rule. It is one which imposes a much lighter obligation

4. *Accord,* Ford v. Nicks, 866 F.2d 865, 873 (6th Cir. 1989) (Plaintiff "was under a duty only to look for and accept employment substantially equivalent to the job from which she was discriminatorily fired."); Carden v. Westinghouse Electric Corp., 850 F.2d 996, 1005 (3d Cir. 1988) ("To cut off a back pay award, defendants must prove that the plaintiff did not exercise reasonable diligence in seeking employment substantially equivalent to the employment he lost."); Floca v. Homcare Health Services, Inc., 845 F.2d 108, 111 (5th Cir. 1988) ("The duty to mitigate requires only that the claimant accept substantially equivalent employment."); and Sangster v. United Air Lines, Inc., 633 F.2d 864, 868 (9th Cir. 1980), *cert. denied,* 451 U.S. 971 (1981).

on claimants. Under the test developed by the Seventh Circuit, it is sufficient for a Title VII claimant to be reasonably diligent merely by "seeking other employment" (A-17) without regard to whether that employment is substantially equivalent to the position that claimant lost. The Seventh Circuit is alone in its position that a plaintiff who is denied initial employment can satisfy the mitigation requirement by doing no more than "demonstrating a continuing commitment to be a member of the work force." (A-18). As a corollary principle, the Seventh Circuit holds that "part-time work in another employment field satisfies the mitigation requirement" even when the plaintiff fails to pursue equivalent full-time jobs which are available in the same area (A-18).

As this Court noted in *Ford Motor Co.*, backpay is not an automatic or mandatory remedy under § 706(g), but it is one which may be invoked in the light of sound discretion. The courts must exercise their equitable power in this area " 'in light of the large objectives of the Act' and in doing so must be guided by 'meaningful standards' enforced by 'thorough appellate review.' " 458 U.S. at 226, *quoting, Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). In addition to preventing employment discrimination, one of the large objectives of Title VII is to eliminate the "years of underemployment or unemployment" that the victims of discrimination suffer during the delays of litigation. *Ford Motor Co.*, 458 U.S. at 229. Any rule applied to the mitigation of damages which does not encourage claimants to avoid both underemployment and unemployment is not in keeping with the statutory goal. By not requiring Title VII claimants to seek substantially equivalent employment,

the rule applied by the Seventh Circuit subsidizes their underemployment and thereby "disserves Title VII's primary goal of getting the victims of employment discrimination into the jobs they deserve as quickly as possible." *Id.* at 241.

The Seventh Circuit's approach to part-time employment puts it squarely in conflict with recent decisions by both the Fifth and Sixth Circuits. In *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), the plaintiff had been terminated in 1973 from her position as an assistant professor of education in violation of Title VII. After 1974, she no longer pursued academic employment opportunities even though several positions were open at nearby state universities. Instead, she obtained a real estate broker's license and helped her husband, on and off, in his business. She also worked briefly for another real estate company and the Tennessee Energy Authority. These actions would clearly have met the Seventh Circuit's test that a claimant "can satisfy the mitigation requirement by demonstrating a continuing commitment to be a member of the work force." (A-18). Nevertheless, the Sixth Circuit denied plaintiff backpay, while ordering reinstatement. Applying the rule requiring a claimant to seek substantially equivalent employment, the Sixth Circuit held that plaintiff's failure to apply for available teaching positions "clearly constituted a failure to exercise reasonable care and diligence required of her . . . ." 866 F.2d at 875.

Also directly contrary to the Seventh Circuit's approach is *Johnson v. Chapel Hill Independent School District*, 853 F.2d 375 (5th Cir. 1988), in which the plaintiff had been terminated from her teaching position on the basis of race in violation of 42 U.S.C. §§ 1981 and

1983. During the period from 1980 to 1986, she did not apply for any teaching positions. The defendant presented evidence that from 1983 to 1986, there were teaching positions available in the area for which plaintiff was qualified. During these years, plaintiff was working part-time in a grocery store that she and her husband owned, although she did not draw a salary. Had the Fifth Circuit followed the Seventh Circuit's flat rule regarding part-time employment, plaintiff would have been found to have demonstrated a continuing commitment to be a member of the work force and thus to have adequately mitigated her damages. Instead, the Fifth Circuit held that the plaintiff "did not exercise reasonable diligence to minimize her damages . . . ." *Id.* at 383.

It is not disputed in this case that after being denied a job as a dock worker with Yellow Freight, plaintiff did not seek employment with any other trucking company. During the relevant time period, other trucking companies in the area were actively hiring dock workers and paying them the same wage rate under the same union contract that covered dock workers at Yellow Freight. The Seventh Circuit excused plaintiff from any obligation to apply for these jobs based on three factors. First, the Court relied upon its rule that part-time work is adequate to satisfy the mitigation requirement. As noted above, the test applied by the Seventh Circuit is not in keeping with this Court's teachings in *Ford Motor Co.* and is in conflict with the rulings of five other Courts of Appeals.[5] Second, the

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5. It should be noted that this is not a case in which a claimant initially sought to obtain substantially equivalent employment but subsequently "lowered her sights" when further search of substantially equivalent work proved futile. *Cf.* Southern Silk Mills, Inc. v. NLRB, 242 F.2d 697, 700 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957).

Court noted that plaintiff continued to inquire about a position at Yellow Freight. Indeed, the only reason plaintiff gave for not applying elsewhere for dock worker jobs was because she "was determined to get on at Yellow Freight." (T-27). The Seventh Circuit's reliance on plaintiff's continued interest in Yellow Freight puts it in conflict with the Eleventh Circuit which has held that a claimant does not satisfy the mitigation requirement by continuing to express an interest in obtaining the job previously denied. The plaintiff's duty to mitigate her damages was "not fulfilled by a readiness to accept only the job sought with the defendant. The plaintiff must be available and willing to accept substantially equivalent employment elsewhere." *Miller v. Marsh*, 766 F.2d 490, 492 (11th Cir. 1985). Finally, the Seventh Circuit found that plaintiff "continued to be assured by Mr. Casey that she would be the first person hired when a position became available." (A-18). This finding is clearly erroneous and did not receive the "thorough appellate review" required by *Ford Motor Co.*, 458 U.S. at 226.[6]

In every Title VII case, the parties must be concerned over the standard to be applied in determining whether the plaintiff has adequately mitigated his or her damages.

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6. Rather than receiving encouraging responses that she would soon be hired, plaintiff testified to exactly the opposite (T-33):

> The Court: I had two questions. When you would call—I have forgotten his name.
>
> The Witness: Mr. Casey.
>
> The Court: Mr. Casey during all this time, what would he say to you?
>
> The Witness: He would say to me that they weren't hiring at all; that he was laying off.

Plaintiff knew that this information was false as of March, 1983, but still failed to seek comparable work elsewhere until June 26, 1984, when she was hired by Yellow Freight (T-33).

"The question has considerable practical significance because of the lengthy delays that often attend Title VII litigation." *Ford Motor Co.*, 458 U.S. at 221 (footnote omitted). In light of the importance of the issue and the fact that the circuits are split, this is an appropriate case for this Court to establish a "meaningful standard" for the guidance of the lower courts. *Id.* at 226.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX 1

(Decided April 28, 1989)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-1733 and 88-1797

COLLEEN DONNELLY,
Plaintiff-Appellee,
Cross-Appellant,

v.

YELLOW FREIGHT SYSTEM, INC.,
Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 85 C 7195—James B. Moran, *Judge*.

ARGUED DECEMBER 2, 1988—DECIDED APRIL 28, 1989[1]

Before BAUER, *Chief Judge*, CUMMINGS, and EASTERBROOK, *Circuit Judges*.

1. Pursuant to Circuit Rule 4000, this opinion has been circulated to all the active members of the court because it overrules *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932 (7th Cir. 1988), and creates a conflict with *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984). No judge in regular active service has requested a hearing *en banc*.

BAUER, *Chief Judge*. This case is before us on appeal from a judgment by the district court entered in favor of plaintiff, Colleen Donnelly. Plaintiff brought suit against her employer, defendant Yellow Freight System, Inc., on charges of sex discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. For the following reasons, we affirm the district court's decision on all issues, except the court's order denying an award of prejudgment interest.

I.

Donnelly applied for a dock-worker position at Yellow Freight on October 26, 1982. Although Yellow Freight was not hiring at the time, Neil Casey, the terminal manager, told her that when Yellow Freight began hiring again, Donnelly would be the next dock worker hired. About the same time, Donnelly also applied for jobs at Jewel Food Stores and Retail Inventory Service Co. (RIS). In December of 1982, RIS hired Donnelly on a part-time basis and she worked there through June of 1984.

Despite securing a job at RIS, Donnelly called Casey weekly to inquire about job openings at Yellow Freight. Although Yellow Freight began hiring dockworkers again in February of 1983, Casey not only continued to tell Donnelly that Yellow Freight was not hiring, but also falsely reported that Yellow Freight was laying off dockworkers. Eighteen months later, Donnelly was finally hired by Yellow Freight.

In March of 1985, Donnelly filed charges with the Equal Employment Opportunity Commission (EEOC). In her first charge she alleged that the defendant discriminated against her on the basis of sex by failing to offer her employment as a dock worker. In her second charge

she alleged that the defendant discriminated against her on the basis of sex subsequent to her hiring at Yellow Freight. (This charge was later dismissed on summary judgment and no appeal was taken.) On March 15, plaintiff received a Notice of Right to Sue Within 90 Days from the EEOC.

On May 22, 1985, within the 90-day limitation period, plaintiff filed a two-count complaint against the defendant in the Circuit Court of Cook County, alleging sex discrimination in violation of the Illinois Human Rights Act (IHRA), Ill. Rev. Stat. ch. 68, ¶ 1-1-1 *et seq*. (1983). On June 28, 1985, defendant filed a motion to dismiss plaintiff's complaint for failure to exhaust state administrative remedies as required by the IHRA. On July 17, Donnelly sought leave to file an amended complaint, appending proposed Counts III and IV. Counts III and IV realleged the same facts as in Counts I and II of the original complaint but were premised under Title VII. Although Donnelly had not yet filed the motion to amend her complaint, Yellow Freight objected to the proposed motion. On August 9, Donnelly actually filed her motion to amend the complaint. On the same date, the circuit court entered an agreed order dismissing her original complaint with prejudice and continuing her contested motion for leave to file an amended complaint. This order essentially resulted in a lawsuit without a complaint. For a discussion of the problems attending the agreed order, see n.10, *infra*.

On August 14, 1985, Yellow Freight filed a petition to remove the case to the United States District Court. The district court granted Donnelly's motion to file an amended complaint on September 13, and the complaint was filed on September 20. Yellow Freight moved to dismiss the complaint on the grounds that it was filed more than 90

days after the EEOC issued the right to sue letter. The court denied the defendant's motion.

On November 3, 1987, the case was tried before a United States magistrate pursuant to the consent of the parties. *See* 28 U.S.C. § 636(c). Because Yellow Freight admitted liability for sex discrimination, only the issues of back pay and mitigation of damages were tried. The magistrate concluded that Donnelly had exercised reasonable diligence in her search for other employment and awarded her damages equal to the amount she would have earned had she been hired by Yellow Freight on February 8, 1983, less her wages earned at RIS. The magistrate also found that plaintiff was entitled to salary increases adopted at Yellow Freight during the eighteen-month period in which she was not hired, and that she was entitled to pension fund contributions and prejudgment interest. The district court adopted the magistrate's recommendations and findings, except that it did not award prejudgment interest to the plaintiff.

Yellow Freight then brought this appeal. First, Yellow Freight alleges that the 90-day limitations period within which to filed a Title VII complaint expired before Donnelly filed her federal claim. Second, Yellow Freight alleges that the district court abused its discretion in finding that Donnelly acted with reasonable diligence to mitigate her damages. On cross-appeal, Donnelly argues that the district court abused its discretion by failing to award her prejudgment interest. We reject both of Yellow Freight's arguments and we agree with Donnelly's contention that she is entitled to prejudgment interest.

II.

Before reaching the merits of this case, we first must decide whether Donnelly's Title VII cause of action was timely filed. In order to bring the action, Donnelly had to file suit against Yellow Freight within 90 days of the issuance of the EEOC's Notice of Right to Sue. Although Donnelly filed her state claim in state court within the 90-day window, she did not file her Title VII claim in federal court within the requisite time period. Yellow Freight's first argument is that any filing in state court, whether before or after the close of the 90-day window, cannot toll the limitation period because Title VII jurisdiction is exclusively federal. Therefore, defendant continues, plaintiff did not effectively file her complaint until she filed it in federal court on September 20, 1985, which was more than six months after the EEOC issued the Notice of Right to Sue. Second, defendant argues that even if federal and state courts share jurisdiction over Title VII claims, plaintiff's amended claim does not relate back to her original claim because her original complaint was brought under the IHRA.

A.

Unless Congress includes in the statute an explicit statement vesting jurisdiction exclusively in federal court, state courts may presume that they share jurisdiction concurrently with the federal courts over a federal cause of action. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). This is a presumption deeply imbedded in the history of our federal system. *See* The Federalist No. 82 (A. Hamilton). Because federal courts are courts of limited jurisdiction, *see Sheldon v. Sill*, 1 How. 441 (1850) state courts must stand ready to vindicate federal rights, subject to review by the Supreme Court, should Congress

decide not to confer jurisdiction upon the federal courts to hear a particular federal claim. *See Gulf Offshore*, 453 U.S. at 478 n.4 (*citing Martin v. Hunter's Lessee*, 1 Wheat 304, 346-48 (1816)). The presumption in favor of concurrent jurisdiction may be rebutted only by an "unmistakable implication (of exclusive jurisdiction) from legislative history," *id.* at 478 (*citing California v. Arizona*, 440 U.S. 59, 66-68 (1979)), or by a "disabling incompatibility between the federal claim and state-court adjudication." *Id.* at 477-478 (*citing Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-508 (1962); *see also Claflin v. Houseman*, 93 U.S. 130, 136 (1876)).

Because Congress failed to address this issue explicitly, Yellow Freight urges us to find that the presumption of concurrent jurisdiction is not applicable to Title VII and that the circumstances warrant a finding of exclusive federal jurisdiction. In so doing, Yellow Freight asks us to adopt the Ninth Circuit's conclusion in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984), and hold that both the statutory language and the legislative history of Title VII raise the unmistakable implication of exclusive federal jurisdiction.[2] *See also Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3rd Cir. 1986) (Title VII jurisdiction is exclusively federal);[3] *Dickinson v. Chrysler Corp.*, 456 F. Supp. 43 (E.D. Mich. 1978) (same). *But see*

2. In reaching its conclusion, the *Valenzuela* court also relied on dictum from the Supreme Court's opinion in *Lehman v. Nakshian*, 453 U.S. 156, 164 n.12 (1981). However, the *Lehman* dictum concerned the allocation of jurisdiction in favor of the federal district courts and to the exclusion of the Court of Claims. As such, it does not lend support to the Ninth Circuit's conclusion.

3. Although the *Bradshaw* court stated that Title VII jurisdiction was exclusively federal, it provided no reasoning to support its conclusion. Therefore, we do not find this case to be persuasive authority.

Bennum v. Board of Governors of Rutgers, 413 F. Supp. 1274 (D. N.J. 1976) (Title VII jurisdiction is concurrent); *Greene v. County School Bd.*, 524 F. Supp. 43 (E.D. Va. 1981) (same).[4]

We decline the invitation to join in the conclusion of the *Valenzuela* court. The *Valenzuela* court found Congress' grant of jurisdiction to the federal district courts, *see* 42 U.S.C. § 2000e-5(f)(3) ("[e]ach United States district court . . . shall have jurisdiction of actions brought under this subchapter"), and the accompanying procedural directives,[5] to be a persuasive indication of exclusive federal jurisdiction. However, "the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Gulf Offshore*, 453 U.S. at 479 (*citing United States v. Bank of New York & Trust*, 296 U.S. 463 (1936)). *See also Charles Dowd*, 368 U.S. at 506; *Galveston, H. & S.A.R. Co. v. Wallace*, 223 U.S. 481 (1912). Moreover, the legislative history of Title VII does not persuade us that Congress intended jurisdiction over the statute be exclusively federal. The *Valenzuela* and *Dickinson* courts found it significant that the history con-

4. This circuit has yet to squarely address whether jurisdiction over actions brought pursuant to Title VII is exclusively federal. However, the reasoning of an earlier decision of this circuit, *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932 (7th Cir. 1988), assumes that Title VII jurisdiction is exclusively federal. We now overrule the *Brown* decision. For a further discussion of *Brown* see *infra*.

5. *See* 42 U.S.C. §20005-5(j) ("Any civil action brought under this section . . . shall be subject to appeal as provided in sections 1291 and 1292, Title 28") (Sections 1291 and 1292 govern the jurisdiction of the United States Court of Appeals). *See also* 42 U.S.C. §2000e-5(f)(2) ("any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure").

tained references to federal courts but not to state courts.[6] *Valenzuela*, 739 F.2d at 436 (*quoting Dickinson*, 456 F. Supp. at 46). But because Congress has the power to grant or deny jurisdiction to the federal district courts, the only significance that can be garnered from these references is that Congress intended to grant jurisdiction to the federal courts.

On the other hand, the logical consequences of other passages from the legislative history lead to the conclusion that jurisdiction over Title VII is shared between the state and federal courts. Title VII was never intended to be the exclusive remedy for employment discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974); *see also* 110 Cong. Rec. 7207 (1964); Interpretive Memorandum of Senators Clark and Case, 110 Cong. Rec. 7214 (1964). In addition to recognizing the force of other laws designed to combat employment discrimination, Congress also wanted to encourage resort to state employment discrimination laws. *See* 110 Cong. Rec. 12707, 13081, 13087. An examination of the principles of res judicata and collateral estoppel applicable to Title VII actions reveals that this intent would be frustrated if jurisdiction over Title VII was exclusively federal. Title 28 U.S.C. § 1738 requires federal courts to afford the same full faith and credit to state court judgments that would apply in the state's own courts. Thus federal courts must give preclusive effect to a previous state court judgment under state employment dis-

6. The 1963 House Report states that "the district courts of the United States . . . are given jurisdiction of actions brought under this title." H.R. Rep. No. 914, 88th Cong., 1st Sess. 29 (1963), *reprinted in* 1964 U.S. Code Cong. & Ad. News 2355, 2405; *accord* H.R. Rep. No. 238, 92nd Cong., 1st Sess. 12 (1971); *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2147.

crimination laws. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238 (7th Cir. 1983); *Unger v. Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir. 1982), *cert. denied*, 460 U.S. 1192 (1983). If Title VII jurisdiction was exclusively federal, a plaintiff would have to bring suit in federal court to preserve all available remedies for employment discrimination. Such a situation effectively precludes state court adjudication of state-created rights, thereby discouraging the creation and development of state employment discrimination laws, contrary to Congressional intent.

Although there is little in the legislative history of Title VII to rebut the presumption of concurrent jurisdiction, we must also examine whether there exists a "disabling incompatibility" arising from state court adjudication of a Title VII claim. To resolve this question, the Supreme Court has suggested an examination of such factors as the desirability of uniform interpretation of the statute, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims. *Gulf Offshore*, 453 U.S. at 483-84. *See also* Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 Mich. L. Rev. 311, 329-35 (1976); Note, *Exclusive Jurisdiction of Federal Courts in Private Civil Actions*, 70 Harv. L. Rev. 509, 511-15 (1957). We find that none of these factors compels a finding of exclusive federal jurisdiction.

There is no reason to believe that concurrent jurisdiction will lead to the arbitrary development of Title VII law. There already exists a great volume of Title VII law developed by the Supreme Court and lower

federal courts and the states are bound by the Supremacy Clause to follow federal law.[7] Although it is true that at this point in time federal judges may have developed greater expertise with respect to Title VII claims, there is no reason to presume state courts are not competent to adjudicate these issues. Such a notion overlooks the obvious; most states have enacted employment discrimination laws, which are routinely litigated in state courts, and state court judges are accordingly quite familiar with discrimination issues.

In addition, we find no basis for the assumption that state courts might not faithfully enforce Title VII. Given that state courts exercise concurrent jurisdiction over civil rights actions brought under 42 U.S.C. § 1983, *Martinez v. California*, 444 U.S. 277 n.7 (1980), it is hard to imagine that state courts would not be hostile to section 1983 actions, but would be hostile to Title VII actions. Similar, although not identical, policy issues underlie both statutes. Second, most states have enacted employment discrimination laws. Whether enacted by state government or federal government, the same policy issues underlie employment discrimination laws. Thus from a theoretical viewpoint, state courts are as amenable to Title VII claims as federal courts. In addition, any concern either party may have over the fairness of the forum is easily remedied. A plaintiff can file the

7. Even when federal law is not clearly developed or preempts state law, jurisdiction may be exercised concurrently. For example, even though §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185, authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), state courts exercise jurisdiction over claims brought under §301(a) concurrently with the federal courts. *See Charles Dowd*, 368 U.S. 502.

complaint in federal court and a defendant can remove the complaint to federal court.[8]

Finally, we find support for our conclusion that the state courts have concurrent jurisdiction with the federal courts over Title VII actions from Congress' decision to vest state courts with concurrent jurisdiction over claims brought under the Age Discrimination in Employment Act of 1967 ("ADEA"), a statute predicated upon Title VII in many ways. *See* 29 U.S.C. § 626(c)(1) ("[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . .").[9] *See also Lehman v. Nakshian*, 453 U.S. 156, 164 n.12 (1981). Both statutes seek to eradicate the evil of employment discrimination based upon membership in an identifiable group. Whereas Title VII is aimed at ending discrimination based upon race, color, religion, sex or national origin, the ADEA is directed toward ending discrimination based upon age. The prohibitions of the

8. The opportunity to exercise removal jurisdiction also explains some Supreme Court dictum which seems to suggest that Title VII jurisdiction is exclusively federal. *See, e.g., Alexander*, 415 U.S. at 47 (lists state and local agencies, and federal courts, but not state courts as forums for enforcement); *Kremer*, 456 U.S. at 468 (federal courts are "entrusted with ultimate enforcement responsibility" over Title VII actions).

9. Title VII, on the other hand, provides that the United States district courts shall have jurisdiction over claims brought under the Act. Because the enforcement provisions of the ADEA, 29 U.S.C. §626, incorporate by reference most of the enforcement provisions of the Fair Labor Standards Act of 1938 ("the FLSA"), 29 U.S.C. § 201 *et seq.*, we do not find the different jurisdictional language of Title VII and the ADEA significant. Among other things, the FSLA provides that an aggrieved person may bring an action in any court of competent jurisdiction. 29 U.S.C. § 216(b). Thus the different jurisdictional language is not the conscious result of an attempt to differentiate between jurisdiction over the ADEA and Title VII, but rather the result of the specific enforcement provisions of the FLSA.

ADEA generally follow those of Title VII and courts have relied on precedent under Title VII to interpret comparable ADEA provisions. *See, e.g., Hodgson v. First Fed. Sav. & Loan Ass'n,* 455 F.2d 818, 820 (5th Cir. 1972) ("[w]ith a few minor exceptions the prohibitions of this enactment are in terms identical to those of Title VII . . . except that 'age' has been substituted for 'race, color, religion, sex or national origin' "). Commentators describe the ADEA as a hybrid of Title VII and the Fair Labor Standards Act of 1938 ("FLSA"): the substantive provisions are drawn from Title VII, but the remedies are those of the FLSA. *See* B. Schlei & P. Grossman, *Employment Discrimination Law* 485 (1983). To prove an ADEA claim, plaintiffs generally proceed under a disparate treatment theory (although in rare circumstances a disparate impact claim may be brought). The order and allocation of evidentiary burdens, and the standards of proof set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), a Title VII disparate treatment case, apply to claims brought under the ADEA. *See* Schlei & Grossman at 497-504. Given the extensive similarities between the two statutes, and the fact that state courts have jurisdiction over private-sector ADEA claims, it seems incongruous to assume that state courts are incompetent to adjudicate Title VII claims.

As an alternative to its attempt to overcome the presumption of concurrent jurisdiction, Yellow Freight contends Illinois courts do not have jurisdiction to hear federal Title VII claims as a matter of Illinois state law. For this unique proposition, Yellow Freight relies on the Illinois Supreme Court's decision in *Mein v. Masonite Corp.*, 109 Ill. 2d 1, 485 N.E. 2d 312 (1985). In *Mein*, the plaintiff alleged that he was wrongfully discharged

from his job in violation of Illinois public policy. Because the plaintiff failed to allege a violation of the Illinois Human Rights Act (the IHRA), the Illinois Supreme Court dismissed his complaint for failure to state a cause of action. In reaching its conclusion, the court stated that the Illinois "courts have no jurisdiction to hear independent actions for civil rights violations." *Mein,* 485 N.E. 2d at 315. Drawing upon this dictum, Yellow Freight argues that, at least in Illinois, state courts do not provide a forum for Title VII litigation and therefore jurisdiction lies exclusively with the federal courts.

We must reject this argument. Even if the *Mein* court did, in fact, intend to exclude Title VII claims from the Illinois courts,[10] neither the Illinois courts nor legislature have the power to close state court doors to federal causes of action. When presented with a federal claim over which concurrent jurisdiction exists, state courts are under a "duty to exercise (jurisdiction)" over the federal claim. *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1, 58 (1912) (state courts required to hear actions arising under the Federal Employers Liability Act); *Testa v. Katt,* 330 U.S. 386 (1947) (state courts must hear actions arising under the Emergency Price Control Act). *Cf. Palmore v. United States,* 411 U.S. 389, 402 (1973) ("this court unanimously held (in *Testa*)

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10. Yellow Freight reads the *Mein* decision too broadly. At issue in *Mein* was whether the plaintiff could bring a state action, independent of the IHRA, for human rights violations. The court responded "(i)t is clear that the legislature intended the (IHRA), with its comprehensive scheme of remedies and administrative procedures, to be the exclusive source for redress of alleged human rights violations . . . the legislature intended . . . to avoid direct access to the courts for redress of civil rights violations." *Mein,* 485 N.E.2d at 315. The only issues before the *Mein* court were the scope and intent of the IHRA; the court did not purport to address issues of federal law.

that Congress could constitutionally require state courts to hear and decide Emergency Price Control Act cases involving the enforcement of federal penal laws"). *But see Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (only law-making power of the State of New York has power to confer jurisdiction upon the New York state courts; Congress does not have this power). *See generally*, Redish & Muench, *supra*. Once Congress has vested jurisdiction over a federal claim in the state courts, the state courts, including the courts of Illinois, are under a constitutional obligation to exercise jurisdiction.

We must address one final point. Donnelly did not exhaust her state administrative remedies before filing her state law claim in state court. In *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932, 934-35 (7th Cir. 1988), this court held that a state court filing did not toll the Title VII 90-day filing period because the plaintiff did not exhaust her state administrative remedies. On the basis of *Felder v. Casey*, ... U.S. ....., 108 S. Ct. 2303 (1988), we now overrule *Brown*. In *Felder*, the Supreme Court held that a plaintiff who filed a section 1983 action in state court did not have to comply with the state's notice of claim statute because the state statute conflicted both in purpose and effect with the remedial objectives of section 1983 and because enforcement of the statute would produce different outcomes based solely upon whether the claim was asserted in state or federal court. Similar concerns are applicable here. This is not to say that a state could not impose an exhaustion requirement for claims based entirely on state law but here, of course, the foundation was Title VII and plaintiff complied with her requirement under that statute. Thus Donnelly's failure to exhaust her state

administrative remedies does not defeat the tolling effect of her state court filing upon Title VII's 90-day window.

Because we find that jurisdiction over Title VII claims is vested in both state and federal court, we reject Yellow Freight's argument that the state court filing did not toll the 90-day statute of limitations.

B.

Yellow Freight next argues that even if there exists concurrent jurisdiction, plaintiff's complaint was not timely filed because her amended complaint, filed in federal court and alleging Title VII violations, does not relate back to her original complaint, filed in state court and alleging state law violations. Defendant claims that it did not have notice of the Title VII claims because the original complaint only alleged violations of the IHRA.

Yellow Freight misconstrues the standard by which an amended complaint is deemed to relate back to the date of the original complaint for the purposes of tolling the statute of limitations. Under Federal Rule of Civil Procedure 15(c), an amended complaint relates back to the date of the original pleading "whenever the claim . . . asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth . . . in the original pleading." Contrary to defendant's assertion, the same substantive legal theory need not be alleged in both complaints; rather the claims need only arise out of the same "conduct, transaction or occurrence." Because the Title VII and IHRA claims are based upon identical facts and circumstances, plaintiff's amended complaint clearly relates back to the date of the original complaint.

The only problem with the above analysis is that the original complaint was dismissed before the amended complaint was filed. If we adhere to the terms of the agreed order entered by the state circuit court, there is no original complaint to which the amended complaint could relate back. However, the agreed order, drafted by the parties, utterly makes no sense.[11] Because of this and because Yellow Freight will suffer no prejudice, we refuse to adhere to the literal consequences of the order. Any claim of prejudice by Yellow Freight is disingenuous. Yellow Freight received notice that an employment discrimination claim was pending against it when plaintiff filed her state court claim in state court. *See Sessions v. Rush State Hospital*, 648 F.2d 1066, 1070 (5th Cir. 1981) ("[s]o long as the Title VII claim is based on the discrimination originally charged in the complaint, allowing it to relate back . . . works no hardship on the defendant for the original complaint furnished adequate notice of the nature of the suit"). Second, in view of the fact that the order continued the plaintiff's contested motion, Yellow Freight cannot now argue that it thought that the threat of litigation had passed upon entry of the agreed order. Yellow Freight also sought removal of the lawsuit after

11. Under the agreed order, plaintiff's original complaint was dismissed with prejudice, but her motion to file an amended complaint was continued. Problems abound in this order. To begin with, the original complaint should not have been dismissed with prejudice. The complaint was dismissed because plaintiff failed to exhaust her administrative remedies; in such a circumstance, the proper remedy is to dismiss the complaint *without prejudice*. Second, once the original complaint was dismissed, there was no point in continuing plaintiff's motion to file an amended complaint. The amended complaint would have nothing to amend. Further, a future complaint alleging Title VII violations would have been barred by the doctrine of res judicata because the original complaint alleging IHRA violations was dismissed *with prejudice*.

the agreed order was entered.[12] For these reasons, we find the plaintiff's amended complaint relates back to the filing date of the original complaint and thus was timely filed.

III.

We may now address the substantive issues raised on this appeal. As already mentioned, Yellow Freight admitted liability and only the issue of damages was tried before the magistrate. Yellow Freight contends that the damage award should be reversed because Donnelly failed to exercise reasonable diligence in mitigating her damages. Title VII provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S. § 2000e-5(g). The district court adopted the magistrate's finding that Donnelly did, in fact, exercise reasonable diligence. This court is bound by the district court's award of damages unless that determination is clearly erroneous. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *United States v. City of Chicago*, 853 F.2d 572, 578 (7th Cir. 1988).

Because a plaintiff's failure to mitigate damages is an affirmative defense, the employer bears the burden of proof on this issue. *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1234 (7th Cir. 1986). In order to succeed on its claim, Yellow Freight must prove that Donnelly was not reasonably diligent in seeking other employment, and that with the exercise of reasonable diligence there was a

12. This removal was defective because at the time of removal there was nothing to remove. Although removal was improper, this court is not deprived of jurisdiction because the district court actually had jurisdiction over the amended complaint alleging Title VII violations. *See Grubbs v. General Electric*, 405 U.S. 699 (1972).

reasonable chance the employee might have found comparable employment, the earnings of which would offset any damages awarded. *Id.* Yellow Freight contends that Donnelly's part-time employment with RIS does not demonstrate reasonable diligence. We disagree.

When a plaintiff is denied initial employment, he or she can satisfy the mitigation requirement by demonstrating a continuing commitment to be a member of the work force. This circuit has held previously that part-time work in another employment field satisfies the mitigation requirement. *See, e.g., Wheeler,* 794 F.2d 1228, *Orzel v. City of Wauwatosa,* 697 F.2d 743 (7th Cir. 1983), *cert. denied,* 464 U.S. 992 (1983); *Sprogis v. United Airlines, Inc.,* 517 F.2d 387 (7th Cir. 1975). Not only did Donnelly accept a part-time job with RIS, she continued to inquire about a position at Yellow Freight and continued to be reassured by Mr. Casey that she would be the first person hired when a position became available. On the basis of these facts, the district court's award of damages was not clearly erroneous and so stands.

The last issue left to decide is whether Donnelly is entitled to prejudgment interest on her damage award. The decision to grant or deny an award of prejudgment interest lies within the discretion of the district court. *Taylor v. Philips Industries, Inc.,* 593 F.2d 783, 787 (7th Cir. 1979). In this case, the district court denied the magistrate's award of prejudgment interest because the issue of plaintiff's diligence was "close." Whether or not an award of interest should be granted turns upon whether the amount of damages is easily ascertainable, not whether the issue of mitigation was "close." *See, e.g., Domingo v. New England Fish Co.,* 727 F.2d 1429, 1446, *modified,* 742 F.2d 520 (9th Cir. 1984); *Behlar v. Smith,* 719 F.2d 950,

954 (8th Cir. 1983), *cert. denied sub nom. Univ. of Arkansas Bd. of Trustees v. Greer,* 466 U.S. 958 (1984); *EEOC v. Wooster Brush Co.,* 727 F.2d 566, 578 (6th Cir.), *cert. denied,* 467 U.S. 1241 (1984). Refusal to award interest based upon the reasoning articulated by the district court is an abuse of discretion. *See Hanna v. American Motors Corp.,* 724 F.2d 1300, 1311 (7th Cir. 1984) (district court's refusal to award prejudgment interest because liability question was "close" was an abuse of discretion). Because Colleen Donnelly's damages were readily ascertainable, the district court should have awarded her prejudgment interest on her damage award.

The decision of the district court is affirmed in all respects except that the matter is returned to the district court with the direction to enter an order granting Donnelly appropriate prejudgment interest.

Affirmed in part, remanded for action consistent with this opinion.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

(Dated July 17, 1989)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
July 17, 1989.

Before
Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

No. 88-1733
88-1797

COLLEEN DONNELLY,
Plaintiff-Appellee,
Cross-Appellant,

vs.

YELLOW FREIGHT SYSTEM, INC.
Defendant-Appellant,
Cross-Appellee.

Appeal From the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 85 C 7195, James B. Moran, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-titled cause by the defendant-appellant, cross-appellee, no judge

in regular active service has requested a vote on the suggestion for rehearing, and all of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX 3

(Dated March 17, 1988)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CASE NUMBER: 85 C 7195

COLLEEN DONNELLY

v.

YELLOW FREIGHT SYSTEMS, INC.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That we award basic backpay in the amount of $27,-656.61, retroactive seniority from February 8, 1983, $4,800.00 in resulting additional wages, pension contributions of $3,976.00 (plus any penalties or interes required by the Funds), attorney's fees of $21,876.00 and $718.72 in costs. (See Memorandum and Order dated 3-17-88)

H. Stuart Cunningham
Clerk
/s/ Willie A. Haynes
Willie A. Haynes
(*By*) *Deputy Clerk*

Date March 17, 1988

APPENDIX 4

(Dated March 17, 1988)

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 85 C 7195

COLLEEN DONNELLY,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant.

MEMORANDUM AND ORDER

Magistrate Bucklo, in this action where sex discrimination was conceded, awarded backpay of $27,656.61, prejudgment interest and other relief, together with fees and costs. Defendant objects to the award, contending that it is clearly erroneous to find that plaintiff exercised reasonable diligence in seeking other employment. The magistrate thought it was a close case. This court concurs, but we do not believe that the finding is clearly erroneous or that the award of backpay is an abuse of discretion.

Central to defendant's objections is the view that a plaintiff has an obligation to seek substantially equivalent employment, and that is not quite so. A plaintiff does not have an obligation to seek demeaning, distasteful or inferior employment, but she cannot sit idly by if substantially equivalent employment is readily available,

Sangster v. United Air Lines, Inc., 633 F.2d 864, 868 (9th Cir. 1980). That does not mean, however, that a plaintiff necessarily has failed to mitigate damages because she chooses to set her sights somewhat lower and seeks employment not as remunerative as the position from which she was excluded. The real question is whether a plaintiff has demonstrated a continuing commitment to be a member of the labor force. It is unlikely that defendant would have objected to the award if plaintiff had obtained full-time employment as an inventory-taker and was suing only for the wage differential. That alternate employment is mitigation, and a discriminatory employer cannot use the concept that a plaintiff need not seek a lesser job to penalize one who did.

Defendant's real objection is that plaintiff's efforts to obtain a dockworker position at some other company were modest at best, even though such positions were available, and she did not obtain full-time alternate employment. Plaintiff occasionally checked want ads and occasionally inquired of friends. There were other companies in the locality which employed dockworkers, but she did not directly approach them and she did not use available agency resources.

But those were not the extent of plaintiff's efforts. She called defendant often and, the record indicates, received periodic assurances that she would be hired. Defendant gave her reason to believe that employment with that company was just over the horizon and in the meantime she took a part-time job. Each inquiry demonstrated a commitment to the labor force, each rejection (when defendant was in fact employing) was a separate discrimination, and the encouraging responses provided some justification for not going elsewhere. A plaintiff cannot

insist upon a specific position at a specific company. That means that a plaintiff cannot once be rejected, file a charge and sit at home until her charge is resolved. Such, however, were not the circumstances of this case.

We do, however, agree with the defendant in one respect. In one short paragraph the magistrate noted that plaintiff sought prejudgment interest and that such an award is discretionary, and then, without discussion, awarded interest. Once having concluded that plaintiff's diligence "was not great" and that the issue was "close," the magistrate, we believe, should not have awarded prejudgment interest. We otherwise overrule the objections and award basic backpay in the amount of $27,656.61, retroactive seniority from February 8, 1983, $4,800.00 in resulting additional wages, pension contributions of $3,976.00 (plus any penalties or interest required by the Fund), attorney's fees of $21,876.00 and $718.72 in costs.

/s/ James B. Moran
James B. Moran
Judge, United States District Court

March 17, 1988.

APPENDIX 5

(Dated December 10, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS
EASTERN DIVISION

No. 85 C 7195

COLLEEN DONNELLY,
Plaintiff,

v.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant.

REPORT AND RECOMMENDATION OF MAGISTRATE ELAINE E. BUCKLO

This Title VII case was referred to me for trial pursuant to 42 U.S.C. §2000e-5(f)5 and the consent of the parties. Prior to trial, defendant Yellow Freight Systems, Inc. ("Yellow Freight") conceded liability. The case was tried on the issues of back pay, retroactive seniority and other benefits on November 3, 1987.

I. *Findings of Fact*

Federal jurisdiction is based on 42 U.S.C. §2000(e)-5(q).

Plaintiff Colleen Donnelly ("Donnelly") moved to Chicago Ridge, Illinois in June, 1982. She was married and had two children under five years of age. Her home is four blocks from Yellow Freight's Chicago Ridge facility.

Donnelly wanted to work after her move. A neighbor told her that Yellow Freight was hiring dock workers and that it was a good company. Donnelly's father was a truck driver and she is a large woman, capable of loading and unloading heavy materials. She contacted Yellow Freight, filled out an application dated October 26, 1982 and had an interview with the terminal manager, Neil Casey. He told her the company was not hiring but that she would be the first person hired when the situation changed. In fact, beginning in February 8, 1983, Casey hired numerous persons, all male. Not until Donnelly filed a complaint with the EEOC did Casey hire her, on June 26, 1984.

During the period Donnelly was waiting to be hired by Yellow Freight she called Casey often. Each time he told her that Yellow Freight was not yet hiring, that the company was laying off workers, but that she should keep calling.

Donnelly also read the Sunday Chicago Sun-Times want-ads but did not apply for jobs she saw advertised. She did apply for a job with the Jewel food store where she shopped. She also applied for and obtained a job with a company called Retail Grocery Inventory Service ("RGIS") in December, 1982. From that time until she went to work for Yellow Freight, she worked part-time at RGIS, working as many hours as she could as an inventory checker. Her employer, Dave Picard, testified that she was a good worker and worked as many hours as were available. Time records showed she worked 216 hours in the first quarter of 1983, 52.4 hours in the second quarter, 49.7 hours in the third quarter, 52.2 hours in the fourth quarter of 1983, 230.6 hours in the first quarter of 1984 and 141.4 hours in the second quarter of 1984.

Donnelly asked friends and neighbors about other jobs. She did not, however, apply for a job at the Dominicks food store in her neighborhood. She also did not seek a job with any other trucking company. Several trucking companies besides Yellow Freight have facilities in the general area in which Donnelly was interested in working. Each of these companies hired dock workers in 1983 and 1984. Only one, Roadway Express, employs women in that capacity. One other trucking company made an offer to a woman who did not accept the position.

If Donnelly had been hired on February 8, 1983, her wages, less income earned at RGIS, from that date through June 27, 1984, would have been $27,656.61. In addition, the pay difference through December 26, 1985 for retroactive seniority would have meant $4,800.00 in additional wages. Pension fund contributions for the period February 8, 1983 through June 27, 1984 would have been $3,976.00. Health and welfare contributions would have been $4,272.80.

II. *Conclusions of Law*

Donnelly is entitled to retroactive seniority. But for Yellow Freight's sex discrimination, her hire date would have been February 8, 1983. Therefore, that is the date on which her seniority should be based.

For the same reason, Donnelly is entitled to a judgment requiring Yellow Freight to make pension contributions on her behalf in the amount of $3,976.00 (plus any penalties or interest required by the Fund).

Since Donnelly did not actually work at Yellow Freight from February, 1983 through June, 1984, and has

presented no evidence to show what she paid for health insurance or in medical expenses that would have been covered by Yellow Freight's health and welfare benefits during that time, she is not entitled to an award of expenses for health or welfare benefits.

The major issue in this case is whether Donnelly took reasonable steps to mitigate her damages which would entitle her to a back pay award for the time during which Yellow Freight engaged in sex discrimination against her. Title VII states that "[i]nterim earnings or amounts earnable with reasonable diligence by the person . . . discriminated against shall operate to reduce the back pay otherwise available." 42 U.S.C. §2000(e)-5(q). In the Seventh Circuit, once a plaintiff establishes the amount of damages, the burden shifts to the employer to prove that the plaintiff failed to mitigate those damages. *Hanna v. American Motors Corp.*, 724 F.2d 1300 (7th Cir. 1984). The employer must show both that "the plaintiff failed to exercise reasonable diligence to mitigate his damages" and that "there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence." *Id.* at 1307. (Emphasis omitted.)

The amount of diligence shown by Donnelly in seeking work was not great. She did, however, ask friends and neighbors about employment, inquired on numerous occasions at her local grocery store for employment and worked part-time for the entire period covered by the discrimination. A number of cases have held that this is enough. *E.g., Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228 (7th Cir. 1985) (temporary employment during four year period enough particularly where plaintiff's former job, as a car salesman, was in a kind of work in which

few women were employed); *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir. 1983) (part-time job as temporary census taker enough); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387 (7th Cir. 1975) (two month long temporary position and application for another position during two year period sufficient). In this case, while the issue is close, I conclude that Yellow Freight has not carried its burden of proof that Donnelly failed to exercise reasonable diligence in securing other employment during the period in question.

Even if Yellow Freight were to prevail on the issue of reasonable diligence, it has not met its burden of proof on the second prong of the *Hanna* test in that it has failed to show a reasonable likelihood that Donnelly might have found comparable work through reasonable diligence. Yellow Freight presented no evidence to show that any work available to Donnelly except that of dock worker at another trucking facility would have paid comparable wages or carried comparable status. While it did show that other trucking companies were hiring dock workers during the relevant period, only one of these companies actually employed women in the position (a total of five women, the first of which was hired in 1982). One other company offered a position to one woman. As Yellow Freight noted in closing argument, these companies hired 90 dock workers during this time. Considering the few women hired by any of these companies for this position, I conclude that, as the Seventh Circuit found in *Wheeler*, defendant has failed to show a reasonable likelihood that Donnelly would have found comparable work if she had applied. Donnelly is therefore entitled to back pay from February 8, 1983 to the date she was hired in the amount of $27,656.61.

Donnelly also seeks prejudgment interest. Prejudgment interest on back pay awards may be awarded in the discretion of the court. In this case, I agree that it should be awarded.[1]

Finally, Donnelly asks for attorneys fees in the base amount of $24,889.72, plus a multiplier of 1.5 for an aggregate award of $36,256.50 and $718.72 in costs. Yellow Freight disputes the amount of the award, arguing that actions by Donnelly extended the amount of work required and that unnecessary duplicative time is sought to be charged to defendant. I have examined the file and the hourly statements and agree that certain reductions are appropriate. First 18 hours between two attorneys spent on the pretrial order is excessive. While in some cases pretrial orders may require extensive time, that amount of time should not have been required here. Accordingly, the time is reduced to ten hours, one half of the reduction to be taken off each of the attorney's time.

I also agree that time spent in state court unsuccessfully litigating a claim under the Illinois Human Rights Act should be excluded. Accordingly, four hours of attorney Salzetta's time (5/14/85 and 5/15/85) and one half hour of Henely's time (on 5/16/85) should be excluded.

Yellow Freight prevailed on one part of its motion for summary judgment. Salzetta's time is therefore reduced by 6.5 hours and Henely's time is reduced by 2.5 hours (rounding off to the half hour).

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1. Donnelly calculated the amount she claimed she would be entitled to based not only in back pay but pension fund and health and welfare contributions. Donnelly may only obtain interest on the back pay award.

Henely represents that his hourly rate is $150.00 and Salzetta's rate is $90.00. Yellow Freight has not shown that these rates are unreasonable and in my experience they represent customary rates in the community. I find they are reasonable.

Subtracting six hours from Henely's time and 15.5 hours from Salzetta's time, Donnelly's attorneys are entitled to attorneys' fees in the amount of $21,876.00 plus $718.72 in costs (the amount of costs is not disputed).

I do conclude that a multiplier is not appropriate in this case. Donnelly was employed by Yellow Freight months before her attorneys began representing her. Accordingly, they had nothing to do with her being hired. The case was not difficult (indeed, Yellow Freight conceded liability) and the principle risk related to the factual problem of Donnelly's limited efforts to obtain other employment. Donnelly's attorneys will be well compensated by the award of the hourly fees requested. No further award is justified.

In reviewing Donnelly's attorneys' fee petition, I note that they have a contingency fee agreement with Donnelly under which they are to receive forty percent of any amount awarded her *in addition* to any attorneys' fees awarded by the court. I have already concluded that the court award will fully compensate her attorneys. Contingency fee contracts are subject to the supervision of the courts. *Wheatley v. Ford*, 679 F.2d 1037, 1041 (2d Cir. 1982); *Krause v. Rhodes*, 640 F.2d 214, 219 (6th Cir. 1981). The court in *Wheatley* held that payment of a court award of attorney's fees satisfies the attorney's claim for services under the contingent fee contract. *Wheatley v. Ford*, *supra*, 679 F.2d at 1037. In this case the fee award that I have recommended

exceeds forty percent of Donnelly's recovery. I conclude that payment of any attorney fees by Donnelly under the contingent fee agreement in addition to the amounts to be paid by Yellow Freight would violate DR2-106 of the Code of Professional Responsibility,[2] which prohibits attorneys from collecting clearly excessive fees.[3]

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States Magistrate

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2. DR-2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the service.

(8) Whether the fee is fixed or contingent.

3. Donnelly's attorneys cite cases saying that a contingent fee agreement does not provide a ceiling on a court award of fees. That is entirely different from saying that an attorney can have a court award (in whatever amount is deemed appropriate) *and* a 40 percent bite out of a damage or back pay award in addition thereto.

Dated: December 10, 1987

Written objections to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable James B. Moran within ten (10) days after service of this Report and Recommendation. *See* Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

Copies have been mailed to:

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APPENDIX 6

(Dated November 22, 1985)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
OF ILLINOIS
EASTERN DIVISION

No. 85 C 7195
Before the Honorable George N. Leighton,
U. S. District Judge

COLLEEN DONNELLY,
Plaintiff,

v.

YELLOW FREIGHT SYSTEMS, INC.,
Defendant.

MEMORANDUM

On March 15, 1985, plaintiff received from the Equal Employment Opportunity Commission ("EEOC"), a notice of a right to sue for prior charges of sex discrimination she had filed with the EEOC against defendant. Pursuant to Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), she was notified that she must, within 90 days after the issuance of the right-to-sue letter, bring a civil action against the defendant; "otherwise your right to sue is lost." On May 22, 1985, within the 90-day limit, plaintiff filed a two-count complaint in the Circuit Court of Cook County. Both counts of the complaint alleged discrimination in employment by

defendant on the basis of sex and were premised on violations of the Illinois Human Rights Act. Ill.Rev.Stat. ch. 68, par. 1-101 *et seq.* (1983).

On June 28, 1985, defendant filed a motion to dismiss. Plaintiff filed a motion to amend the complaint on August 9, 1985. The proposed amended pleading, although based on the same facts and circumstances as the original complaint, alleged violations of Title VII rather than the Illinois Human Rights Act. On that day, the circuit court entered an agreed order granting defendant's motion to dismiss the original complaint and setting a briefing schedule on plaintiff's motion to file the amended complaint.

On August 14, 1985, defendant removed the action to federal court. This court granted plaintiff leave to file the amended complaint on September 13, 1985; plaintiff did so on September 20, 1985. The amended complaint consists of two counts alleging violations of Title VII. Defendant now moves to dismiss the amended complaint as untimely.

Defendant asserts two separate arguments in support of its conclusion that plaintiff's Title VII claims are untimely, that is, not brought within the 90-day limitation period. First that any filing of a complaint in the circuit court, whether before or after the 90-day limit, was ineffective in that federal courts have exclusive jurisdiction over Title VII actions. Therefore, defendant concludes, the only effective filing of plaintiff's Title VII claims was on September 20, 1985, when plaintiff filed her amended complaint in this court; some six months after the right-to-sue letter was issued.

Second, defendant argues, even if the circuit court had jurisdiction over the Title VII claims, since the first complaint was based on the Illinois Human Rights Act

and not Title VII, it did not toll the 90-day limitation period in that § 706(f)(1) contemplates the filing of a Title VII claim, not one based on a state statute. Defendant points out that the first time plaintiff attempted to amend her claim to a Title VII action in the state court was on August 9, 1985; a date well beyond the 90-day limit. Defendant therefore concludes that the claim is untimely.

As to the jurisdictional argument, the general rule is that unless Congress has made jurisdiction exclusive to the federal courts, state courts have concurrent jurisdiction and may entertain actions based entirely on federal law. *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 477-78 (1981). In this regard, the court begins with the presumption that state courts have concurrent jurisdiction. That presumption can be rebutted only by "an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id.* at 478.

Nowhere in Title VII, neither in language of § 706(f)(1), which gives rise to causes of action nor in § 706(f)(3), which invests this court with jurisdiction, is there an explicit directive from Congress reserving jurisdiction exclusively to the federal courts. *Bennum v. Board of Governors of Rutgers*, 413 F. Supp. 1274, 1279 (D.N.Y. 1976); *Greene v. County School Board of Henrico County, Virgina*, 542 F. Supp. 43, 45 (E.D. Va. 1981).

The legislative history is likewise without clear indication of Congress' intent to make Title VII jurisdiction exclusive. *Bennum*, 413 F. Supp. at 1279; *Greene*, 525 F. Supp. at 45; *Patzer v. Board of Regents of University of Wisconsin*, 577 F. Supp. 1553, 1559 (N.D. Wis. 1984), *rev'd on other grounds*, 763 F.2d 855 (7th Cir. 1985);

contra, Valensuela v. Kraft, 739 F.2d 434, 436 (9th Cir. 1984); *Dickenson v. Chrysler Corp.,* 456 F. Supp. 43, 48 (E.D. Mich. 1978). Further, there is certainly no clear incompatibility between state-court jurisdiction and federal interest in the area of employment discrimination. "Title VII was designed to supplement, rather that supplant, existing laws and institutions relating to employment discrimination." *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 68 (1980); *see also, Spence v. Latting,* 512 F.2d 93, 98 (10th Cir. 1975) and *Bostedt v. Festivals, Inc.,* 569 F. Supp. 503, 507 (N.D. Ill. 1983) (holding that state courts have concurrent jurisdiction with federal district courts over cases arising under 42 U.S.C. § 1983).

Based on the above, it is the courts' opinion that state and federal courts have concurrent jurisdiction to hear claims under Title VII. Therefore, the issue remaining is whether the filing of the original complaint in the circuit court tolled the 90-day limitation period, even though it was based entirely on Illinois statutory law. Once again the court begins its analysis with a presumption, that being that all doubts on jurisdictional timeliness questions are to be resolved in favor of trial. *Caldwell v. National Association of Home Builders,* 771 F.2d 1051, 1054 (7th Cir. 1985).

Federal Rules of Civil Procedure, Rule 15(c) provides that whenever a claim in an amended complaint arises out of the same conduct, transaction or occurrence set forth in the original complaint, the amendment relates back to the date the original complaint was filed. Since the claim in plaintiff's amended complaint, filed on September 20, 1985, arose out of the same set of facts and circumstances as did the claim in the original complaint, the amendment relates back to May 22, 1985, the date of the filing of the original complaint. Therefore, plaintiff's Title VII claims were brought prior to the lapse of the 90-day limitation and were timely. *See, Baldwin County Welcome Center v. Brown,* 446 U.S. 147, ... n.3, 104 S. Ct. 1723, 1725 n.3 (1984).

Further, merely because plaintiff's original complaint based her discrimination claim on Illinois statutory law rather that Title VII does not change the result. *See, Paskuly v. Marshall Field & Co.,* 646 F.2d 1210, 1211 (7th Cir. 1981). The requirement for relation back under Rule 15(c) is not, as defendant suggests, that the substantive legal theory of the amended complaint be the same as the theory in the original complaint, but rather that the claims arise out of the same "conduct, transaction or occurrence."

"So long as the Title VII claim is based on the discrimination originally charged in the complaint, allowing it to relate back . . . works no hardship on the defendant for the original complaint furnished adequate notice of the nature of the suit." *Sessions v. Rusk State Hospital,* 648 F.2d 1066, 1070 (5th Cir. 1981); *see also, Smith v. Town of Clarkton, North Carolina,* 682 F.2d 1055, 1060 (4th Cir. 1982).

Here, the Title VII and Illinois Human Rights Act claims are based on identical facts and circumstances, therefore, relation back applies and the suit was timely filed. Accordingly, defendant's motion to dismiss is denied.

So ordered,

/s/ George N. Leighton
George N. Leighton
United States District Judge

Dated: November 22, 1985

APPENDIX 7

(Filed August 8, 1985)

IN THE
CIRCUIT COURT OF COOK COUNTY,
ILLINOIS

NO. 85 L 11199

Colleen Donnelley

v.

Yellow Freight Systems

AGREED ORDER

This cause coming to be heard upon Defendant's motion to dismiss the Complaint and upon Plaintiff's motion for leave to file an amended complaint, and the parties being in Agreement,

It is hereby Ordered that:

1. Defendant's motion to dismiss is granted and the Complaint be and hereby is dismissed with prejudice.
2. Plaintiff is granted until September 7, 1985 to file a memorandum in support of her motion for leave to file an amended Complaint, and Defendant is granted until September 21, 1985 to reply.
3. Plaintiff's motion for leave to amend is continued until October 1, 1985 at 9:30 am without further notice.

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#90041

JUDGE EDWIN M. DERMAN

AUG. 9, 1985

CIRCUIT COURT

MORGAN M. FINLEY, CLERK OF THE
CIRCUIT COURT OF COOK COUNTY